No. 80-813

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IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK STATE LIQUOR AUTHORITY,

Petitioner,

against

DENNIS BELLANCA, d/b/a THE MAIN EVENT; JAMES C. DeMARCO, d/b/a COLONIE RESTAURANT; BIAGIO DiBLASI & GENNIE PALOMBO, d/b/a FRANK'S CASA NOVA; VINCENT IUDICE, d/b/a 19th HOLD RESTAURANT; PETER KACHINOSKI, d/b/a KACH'S CORNER; JACOB P. PAGANO, d/b/a THE SILVER COACH; RON PAOLINI, d/b/a FRIDAYS AND SATURDAYS LOUNGE; STANLEY J. PROCYSHYN & SYLVIA PROCYSHYN, d/b/a SHVEEDEE'S LOUNGE; NEAL RADICE, d/b/a RADICE'S LOUNGE; SAMUEL RESMAN, d/b/a GLO MAR BAR; TALE OF THE TIGER, INC., d/b/a FLAY'S STEAK PUB; LEONARD ZAMBITO, d/b/a LENNY'S BLUE VELVET LOUNGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Batavia Times Publishing Co.
Batavia, N.Y. (716) 344-2000

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Statement of the Case

Petitioners seek a writ of certiorari to obtain Supreme Court review of a decision of the New York Court of Appeals. Following New York civil procedure, this case reached the highest New York court after only summary proceedings at the trial court level.

Plaintiffs in the action are owners and operators of nightclubs and restaurants licensed by the New York State Liquor Authority to sell liquor by the drink. They brought this declaratory judgment action to challenge, on federal and state constitutional grounds, the validity of a New York statute prohibiting exposure of female breasts in bars. On a notice to dismiss by the defendants, the State Liquor Authority, the trial court granted summary judgment for the plaintiffs, and declared the statute unconstitutional as applied to topless dancing in licensed premises. The memorandum decision by the trial judge explicitly rested on both federal and state grounds.

Direct appeal to the New York Court of Appeals was taken, bypassing the intermediate appellate court. The Court of Appeals affirmed, without discussing the State constitutional issue, finding the First amendment issue dispositive. (Petitioners' appendix, A-8, fn 5). Enforcement of the statute in question was enjoined to the extent that topless dancing is involved.

ARGUMENT

Decision by this Court of the First Amendment Issue in this case would not end this litigation and the record presented is inadequate.

Even if all requirements for jurisdiction are met, this Court has discretion to refuse to exercise that jurisdiction on petition for a writ of certiorari. Rules of the Supreme Court, 17(c), *Hammerstein v. Superior Court of California et al.*, 341 US 491, rehearing denied 342 US 843. In deciding whether a case is appropriate for its jurisdiction, the Court may look to the State Court judgment and opinion as well as other circumstances which may be present. *Gospel Army v. City of Los Angeles*, 331 US 543.

Because this Court's reversal of the New York Court of Appeals on the federal question will not end this litigation, and because of the paucity of the record in this case, this Court should exercise its discretion and deny the petition.

The New York Court of Appeals affirmed the trial court's decision on federal constitutional grounds, and declined to reach the state constitutional question. The rights of the parties have not been fully adjudicated at this point, because only the federal constitutional issue has been decided by the New York Court. This is true, even though the judgment may be technically "final". The real question is whether the record shows that the order of the appellate court has fully adjudicated the rights of the parties, and whether that adjudication is subject to further review by the state court. *Gospel Army v. City of Los Angeles, supra*, at 547.

This Court's power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 US 562. It does not revise state court opinions. The purpose of the rule requiring this Court to review only "final" judgments is to prevent the unnecessary Supreme Court decisions on federal questions, which may prove to be irrelevant and unnecessary to the complete disposition of the litigation. *N. E. Pope et al. v. Atlantic Coast Line Railroad Co.*, 345 US 379.

Because the Court of Appeals did not decide the State constitutional issue, a decision by this Court to reverse on the federal ground would leave the trial court's decision intact insofar as it rests upon state law. Enforcement of the statute would still be enjoined, and further appeals would surely follow. The litigation would not end with the decision of this court, and that decision may well prove to be irrelevant to the disposition of the rights of the parties.

This case reached the Court of Appeals on an expedited appeal from an accelerated judgment. Because of this, the record provides sparse material for this Court to use as a basis for decision of an important issue of state power and First Amendment rights.

The trial court's decision was for summary judgment in favor of the plaintiff bar owners. The evidence before the court was in the form of affidavits only. No hearing was held, no testimony was taken. There was no evidence presented to justify this prohibition of topless dancing, nor any evidence of any misconduct or ill effects associated with this activity.

The only "legislative history" before this court on this record is a memorandum by a single assemblyman, the sponsor of the challenged legislation. This memorandum presents no facts, but merely asserts that "common sense dictates that nudity in bars produces undesirable behavior". No specific instances of "undesirable behavior" or reports of dangerous acts are shown anywhere in the record. Compared with the detailed legislative findings and record of "bacchanalian revelries" in the *California vs. LaRue* case, 409 US 109, the record here is inadequate indeed.

This Court has denied certiorari where the record in a case did not completely present all the relevant facts and circumstances, on the grounds that the case was an "inappropriate vehicle" for the decision of an important First Amendment issue (*Jones v. State Board of Education of Tennessee*, 397 US 31, rehearing denied, 397 US 1018). Likewise, this case reaches this Court on a record which contains inadequate facts to assess the decision of this important First Amendment question. The Court should therefore exercise its discretion to deny the petition.

The New York Court of Appeals decision was not in conflict with applicable decisions of this Court.

The New York Court of Appeals correctly applied the decisions of this Court in *California v. LaRue*, 409 US 109 and *Doran v. Salem Inn*, 422 US 922. Contrary to the contentions of petitioners, these cases do not compel the Court to uphold the Alcoholic Beverage Control Law section here in question.

Unlike the *LaRue* case, this is not a broad attack on the facial validity of a statute prohibiting sexually explicit performances. Rather, this challenge is to the States power to prohibit activity which is admitted to be neither lewd nor obscene. In fact this Court, in *Doran, supra*, recognized bare-breasted dancing as a form of expression. *LaRue* held only that the State of California had shown reason to justify prohibition of conduct, including "gross sexual performances", notwithstanding the incidental effect on constitutionally protected activities. "Topless" dancing was not in question in *LaRue*. In fact, the regulations upheld in that case did not prohibit topless dancing.

Statements from *Doran v. Salem Inn, supra*, cited by petitioner in its brief as construing *LaRue* to allow prohibition of topless dancing were considered by the New York Court of Appeals. The Court recognized these statements as *obiter dicta*, and considered contrary dicta from *Craig v. Boren*, 429 US 190, 207, and decided to rely upon those factors exhaustively discussed and relied upon by this Court in *LaRue*.

The decision of the New York Court of Appeals in this case was not in conflict with applicable decisions of this Court. Therefore, the petition for a writ of certiorari should be dismissed.

CONCLUSION

This petition for Writ of Certiorari to the New York Court of Appeals should be denied.

Dated: Buffalo, New York,
March 17, 1981.

Respectfully submitted,

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